

Office - Supreme Court, U.S.

FILED

JUN 13 1983

ALEXANDER L. STEVAS.
CLERK

No. 82 - 1843

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

KENNETH A. MERENA,
Petitioner

v.

NORMAN SATO, individually and
in his capacity as Building
Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,

Respondents

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

GARY M. SLOVIN
Corporation Counsel
WESLEY F. FONG
Deputy Corporation Counsel
City and County of Honolulu
Honolulu Hale
Honolulu, Hawaii 96813
Telephone: 808-523-4312
Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Whether Petitioner's complaint gave notice of a First Amendment claim.

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties Affected	i
Opinions Below.	2
Jurisdiction	2
Rules Involved	2, 3
Statement of the Case	3
Existence of Jurisdiction Below	5
Reasons for Denying the Writ	5
Conclusion.	9
Appendices A-N	Attached

TABLE OF AUTHORITIES CITED

Cases	Page
Conley v. Gibson, 355 U.S. 40, 78 S.Ct. 109, 2 L.Ed.2d 87 (1957)	8, 9
Daves v. Hawn. Dredging Co., 114 F. Supp. 643 (D.C. Haw. 1953)	6
Plastino v. Mills 236, F.2d 32, (C.A. 9th Cir. 1956).	6, 7
Rules	
Rules of Court, Supreme Court, Rule 17	8
Federal Rules of Civil Procedure	
Rule 8 (a) (e) (f)	2
Texts & Treatises	
Federal Rules Ser. 8a. 26	
Commentary, Pleading of "Theory" of Recovery	5, 6
Moore's Federal Practice, §8.14, Pleading a Legal Theory (1981).	6

No. 82 - 1843

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

KENNETH A. MERENA,
Petitioner

v.

NORMAN SATO, individually and in his capacity as Building
Inspector for the City and County of Honolulu; and
BUILDING DEPARTMENT FOR THE CITY AND
COUNTY OF HONOLULU,
Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Respondents respectfully pray that Petitioner's Writ for
Certiorari to review the decision of the United States Court
of Appeals for the Ninth Circuit in the above case be denied.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is attached to this Petition as Appendix A. That decision was a memorandum opinion and affirmed the judgment of the District Court for the District of Hawaii, which was unpublished, and is attached hereto as Appendix B.

JURISDICTION

The opinion of the court below (Appendices A and C) was entered on February 10, 1983. Rehearing was not sought.

The jurisdiction of this Court is sought pursuant to Rule 28 USC § 1254 (1).

RULES INVOLVED

Rules 8 (a), (e), and (f), Federal Rules of Civil Procedure, read in pertinent part as follows:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which this court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of

the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

STATEMENT OF THE CASE

On August 11, 1978, Appellant filed a Verified Complaint in the United States District Court, District of Hawaii. (Appendix D) Paragraph 14 of that Complaint stated:

It is Plaintiff's position that at the time of filing said Criminal Complaint, *probable cause* did not exist for the charges brought against him. Furthermore, based upon the oral testimony of Defendant Sato at the trial in this matter, said Defendant was in fact aware that this was so. (Emphasis added)

Paragraph 15 of the Complaint stated:

Because of such knowledge, Defendants' actions were done under color of law and in derogation of Plaintiff's rights guaranteed under the *Fourth* and *Fourteenth Amendments* to the United States Constitution, as well as under 42 U.S.C. § 1983. (Emphasis added)

On August 14, 1979, over a year after the filing of the Complaint, Plaintiff filed a Motion for Summary Judgment, again only alleging that Defendant Sato lacked probable cause in the filing of the criminal complaint. (Appendix E) The Honorable Samuel P. King, Judge of the United States District Court for the District of Hawaii, ruled on that issue of probable cause and issued an order denying Plaintiff's Motion for Summary Judgment on September 10, 1979. (Appendix F)

Plaintiff Kenneth Merena was deposed on November 9, 1979, and said deposition was filed in December, 1979. (Appendix G) Pertinent parts of that deposition are as follows:

Q (By Mr. Chang) Do you know what civil rights are?
Do you have an idea of what we call 'civil rights'?

A Yes, I certainly do.

Q All right, what is your understanding of what civil rights are?

A Well, for one thing, I am a very strong believer in and supporter of the Constitution of the United States and I think that the most overlooked rights that people have are fundamental rights contained in the Bill of Rights, the first ten amendments to the Constitution — and to amplify on that it is the clear contention that the CZC is in flagrant violation in this case of the First Amendment, the right of free speech.

Q Okay. Is this what you are suing for, then; is that one of your grounds?

A *No, that is not — unfortunately, that is the stand that I urged Norwood to take. I couldn't because I had no responsibility (sic) for the sign, but if I had I darn well would have stood on that right.*

On December 20, 1979, Plaintiff filed a Statement of Readiness. (Appendix H) Appellant's counsel certified in that Statement of Readiness:

2. That nature of the claim is an action for declaration of rights in violation of 42 U.S.C. § 1983 brought on by the illegal issuance of a criminal complaint in the District Court of the State of Hawaii, Honolulu Division, *without probable cause to believe a crime had been committed.*

(Emphasis added)

3. All required and permitted pleadings were on file and the action was at issue on August 30, 1978.

4. All necessary and proper preliminary proceedings allowed by statute and rule have been completed by all parties. This was completed as of November 6, 1979; there has been reasonable opportunities to complete them.

There was no mention of a First Amendment issue. The Honorable Judge King issued an order setting the case for trial on April 10, 1980. (Appendix I)

On April 29, 1980, Plaintiff Merena filed a Motion for Order Specifying Facts Not in Controversy and Directing Further Proceedings. (Appendix J) That motion was denied on May 30, 1980 (Appendix K), as well as Plaintiff's Motion for Written Report of Proposed Findings of Fact and Recommendations and/or the Alternative to Void Order, on June 6, 1980. (Appendix L)

It was only after the denial of the aforementioned motions that Plaintiff moved to amend his Complaint on June 24, 1980, to include a First Amendment claim. (Appendix M) The Honorable Thomas P. Young, United States Magistrate, United States District Court for the District Court of Hawaii denied the Plaintiff's motion after having accepted and adopted Defendants' reasons for their opposition to the motion. (Appendix N)

A trial by stipulation of facts was held after which a judgment was entered in favor of Defendants-Appellees on December 30, 1981. (Appendix B)

The judgement was affirmed by the Ninth Circuit Court of Appeals on February 10, 1983. (Appendices A and C)

EXISTENCE OF JURISDICTION BELOW

The action was originally brought in Federal Court under 28 USC §1343. Thereafter an appeal was noticed to the Ninth Circuit Court pursuant to 28 USC §1291.

REASONS FOR DENYING THE WRIT

1. THE VERIFIED COMPLAINT DID NOT GIVE DEFENDANTS NOTICE OF A FIRST AMENDMENT CLAIM.

Petitioner is correct in asserting that the Federal rules have become by far more liberal in their pleading requirements. However, this does not mean that a pleading should not indicate the legal theory upon which the pleader hopes to recover. (*Moore's Federal Practice*, §8.14, *Pleading a Legal*

Theory (1981), pp. 8-135). The Federal rules have not done away with the requirement of pleading a legal theory. In fact, "it has been argued that this is now the major function of the pleadings, since the facts can be better gotten at by discovery." (Commentary, Pleading of "Theory" of Recovery, 3 Federal Rule Service 8a. 26).

Further, it is necessary that the pleading give fair notice of the claim. It is not enough to indicate merely that a Plaintiff has a grievance but sufficient detail must be given so that the defendants and the court can, obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal bases for recovery. (*Moore's Federal Practice*, § 8.14 Pleading a Legal Theory (1981) p. 8-118). In *Daves v. Hawn Dredging Co.*, 114 F.Supp. 643 (D.C. Haw. 1953), the court stated:

The requirements of Rule 8 are not met by a mere 'notice of disaffection to the opposite party' . . . [I]t seems to be the purpose of Rule 8 to relieve the pleader from the niceties of the dotted i and the crossed t and the uncertainties of distinguishing in advance between evidentiary and alternate facts, while still requiring, a practical and sensible way, that he set out sufficient factual matter to outline the elements of his cause of action and claim, proof of which is essential to his recovery. [*Daves v. Hawn Dredging Co.*, *supra*, at 645]

The Ninth Circuit Court of Appeals in *Plastino v. Mills*, 236 F.2d 32 (C.A. 9th Cir. 1956), at 34 stated:

One may applaude the objective of the Federal Rules . . . which is to abolish the technicalities of pleading. But the rules didn't abolish the necessity for clear thinking. One can spend a day on the pleadings and the pre-trial order here without coming up with any definite idea of how many claims the plaintiff asserts successively or alternatively.

Although Plaintiff claims that there are facts articulated in the Verified Complaint giving rise to notice of the First Amendment deprivation, he cannot prevail in so contending.

The above authorities are explicit in holding that claims still need to be articulated although specific facts giving rise to those claims need not be. Furthermore, based on *Plastino, supra*, the mere use of word "sign" does not give notice of a First Amendment claim.

2. PLAINTIFF'S ACTIONS SUBSEQUENT TO THE FILING OF THE COMPLAINT DID NOT GIVE DEFENDANTS NOTICE OF A FIRST AMENDMENT CLAIM.

Petitioner argues that he was asserting a First Amendment claim. His actions subsequent to the filing of his Verified Complaint which alleged only Fourth and Fourteenth Amendment violations do not support this contention.

Over a year after the filing of his Complaint, Petitioner moved for summary judgment on the grounds that Defendant Sato lacked probable cause for the filing of the criminal complaint. (Appendix E)

In his deposition taken three months after the filing of the aforesaid motion, Petitioner himself claimed that he was not seeking relief on a First Amendment basis. (Appendix G)

One month later, on December 20, 1979, Petitioner filed his Statement of Readiness. All that was alleged was a violation of 42 U.S.C. § 1983 due to an alleged lack of probable cause. (Appendix H, paragraphs 2 - 4)

On April 29, 1980, the matter was set for trial. (Appendix I)

It was only after the denial of two other pre-trial motions filed by the Petitioner, did Petitioner move to amend his complaint to include a First Amendment violation. (Appendices J, K, L, and M)

Therefore, based on the foregoing, Petitioner cannot argue that his complaint or subsequent actions put the Defendants on notice of a First Amendment claim.

3. THE NINTH CIRCUIT COURT OF APPEALS HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT IS IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

Rule 17 of the Rules of Court, Supreme Court, states in pertinent part:

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are *special and important reasons therefor*. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered

(c) When a state court or a federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court.
[Emphasis added]

The decision rendered by the Ninth Circuit Court of Appeals in the instant case which is not in conflict with any decision rendered by this Honorable Court.

Petitioner cites *Conley v. Gibson*, 355 U.S. 40 (1957) in support of his contention that his pleading gave notice of a First Amendment claim. However, the facts in *Conley*, *supra*, differ from the instant case. The Complaint in *Conley*, *supra*, charged a union with violating a Railway Labor Act by discriminating against Negro railroad employees. The court held that the complaint should not be dismissed for a failure to set forth specific facts to support allegations of discrimination. Because the allegation which was pleaded dealt with a racial discrimination, it would reasonably follow that a general claim of discrimination was being alleged. This however, was not the situation in the instant case. Petitioner's complaint alleged violations of the Fourth and Fourteenth Amendments only. Both of those amendments do not incorporate any First Amendment rights.

Furthermore, this Court stated in *Conley, supra* at 48 that:

[T]he purpose of pleading is to facilitate a proper decision on the merits.

Without any notice of a First Amendment cause of action, proper decision on the merits on that issue could not have been had.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, June 9, 1983.

Respectfully submitted,

GARY M. SLOVIN
Corporation Counsel

WESLEY F. FONG
Deputy Corporation Counsel
Attorney for Respondents

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT**

KENNETH A. MERENA,
Plaintiff — Appellant,

vs.

**NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,**

Defendants — Appellees.

No. 82-4045
D.C. No. Civ. 78-0299

MEMORANDUM

**Appeal from the United States District Court
for the District of Hawaii**

**The Honorable Samuel P. King, Presiding
Submitted — October 28, 1982***

Before: WALLACE, KENNEDY and HUG, Circuit
Judges.

* The panel is unanimously of the opinion that oral argument is not required in this case. Fed. R. App. P.34 (a).

In this action under 42 U.S.C. §1983, the district court entered judgment in favor of Sato and the Honolulu Building Department after trial on stipulated facts. On appeal, Merena argues that the district court erred by (1) construing his complaint to allege only violations of the fourth and fourteenth amendments, and not the first amendment, and (2) refusing leave to amend the complaint to allege a claim based on the first amendment.

The district court did not err in finding that Merena's complaint, read as a whole and viewed broadly and liberally, *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1381 (9th Cir. 1982), did not state a first amendment claim. Merena argues that alleging the criminal charges stemmed from the placement of a political sign constitutes notice of a first amendment claim. This, however, was not sufficient to notify appellees that Merena intended to seek recovery under a first amendment theory.

Refusing to allow Merena to amend his complaint, almost two years after it was filed and after substantial pretrial activity had occurred, was not an abuse of discretion. See *Foman v. Davis*, 371 U.S. 178, 1982 (1962).

The judgment is AFFIRMED.

Filed February 10, 1983

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of Honolulu;
and **BUILDING DEPARTMENT FOR THE CITY
AND COUNTY OF HONOLULU**,
Defendants.

CIVIL NO. 78-0299
FINDINGS OF FACT AND CONCLUSIONS OF LAW

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

The above-captioned case having come to trial by stipulated facts submitted to the Court on April 30, 1981 trial without a jury and the parties having the opportunity to make oral arguments, the Court makes the following findings of facts and conclusions of law,

FINDINGS OF FACT

1. Plaintiff Kenneth A. Merena and Defendant Norman Sato are residents of the City and County of Honolulu, State of Hawaii and that the Building Department of the City and County of Honolulu is part of a municipal corporation established under the laws of the State of Hawaii.
2. That on April 11, 1978, City Building Inspector Norman Sato as a result of a complaint inspected the premises of 1234 Wilder Avenue, and observed a political sign on the premises.
3. That Inspector Sato subsequently called the owner of the property who informed Sato that a tenant named Kenneth Merena was responsible for the sign.

APPENDIX B

4. That Inspector Sato then telephoned Kenneth Merena and the ownership, erection, and maintenance of the sign was discussed, the Inspector Sato learned that Merena put up the sign, and desired to challenge the ordinance in Court.

5. On the basis of that discussion with Kenneth Merena, plus the fact that Merena had previously erected a political sign, a notice of violation was sent to Merena by Sato on April 12, 1978.

6. That a penal summons was signed by Sato charging Merena with violation of Section 21-223(e) of the Comprehensive Zoning Code on April 19, 1978.

7. That when the penal summons was issued, the political sign had been removed.

8. That on July 20, 1978, Judge Bertram T. Kanbara dismissed the criminal charge against Kenneth Merena.

9. That on July 3, 1980, Magistrate Thomas P. Young denied Plaintiff's Motion to Amend the Complaint.

10. That on September 3, 1980, Judge samuel P. King affirmed the July 3, 1980 Magistrate's decision denying Plaintiff's Motion to Amend Complaint.

CONCLUSIONS OF LAW

1. That based upon the facts presented, Building Inspector Sato had probable cause to issue the notice of violation.

2. That a violation of the Comprehensive Zoning Code was committed upon the erection and maintaining of the prohibited sign and Section 21-228 of the comprehensive Zoning Code does not give a five-day grace period before which a prosecution can be commenced.

3. The prosecution of the violation was based upon probable cause and there was no evidence that the prosecution was invidious, arbitrary or discriminatory towards Plaintiff Merena.

4. That Plaintiff Merena has failed to prove by a preponderance of evidence that the actions of Building Inspector Sato and the City violated the Plaintiff's civil rights, and the Defendants are not liable for any injuries sustained by Plaintiff.

5. That the dismissal of the criminal case is not dispositive of the issues in the present action.

6. That the Court finds that Plaintiff Merena's Complaint does not give notice that First Amendment issues may be raised and that Plaintiff Merena was not allowed to raise such issues at this trial.

7. That the Court finds that Judge Samuel P. King was correct in denying Plaintiff's Motion to Amend Complaint and that ruling disposed of this question.

DATED: Honolulu, Hawaii,
November 2, 1981

Walter M. Heen
United States District Judge
Filed November 5, 1981

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of Honolulu;
and **BUILDING DEPARTMENT FOR THE CITY
AND COUNTY OF HONOLULU**,

Defendants.

**CIVIL NO. 78-0299
JUDGMENT**

JUDGMENT

This action came on for trial before the Court,
Honorable Walter M. Heen, United States District Judge,
presiding, and the issues having been duly tried and a
decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment
be entered in favor of Defendants.

DATED: Honolulu, Hawaii,
December 29, 1981

Samuel P. King
United States District Judge

Filed December 30, 1981

IN THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH DISTRICT

KENNETH A. MERENA,
Plaintiff — Appellant,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of Honolulu;
and BUILDING DEPARTMENT FOR THE CITY
AND COUNTY OF HONOLULU,

Defendants - Appellees.

No. 82-4045
DC #Cv78-0299 SPK

**APPEAL from the United States District Court
for the District of Hawaii (Honolulu).**

THIS CAUSE came on to be heard on the Transcript
of the Record from the United States District Court for
the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court, that the judgment of
the said district Court in this Cause be, and hereby is
affirmed.

Filed and entered February 10, 1983.

APPENDIX C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT**

KENNETH A. MERENA,
Plaintiff — Appellant,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of Honolulu;
and **BUILDING DEPARTMENT FOR THE CITY
AND COUNTY OF HONOLULU**,

Defendants — Appellees.

No. 82-4045
D.C. No. Civil 78-0299

MEMORANDUM

Submitted — October 28, 1982*

Decided — February 10, 1983

**Appeal from the United States District Court
for the District of Hawaii**

The Honorable Samuel P. King, Presiding

Before: **WALLACE, KENNEDY and HUG**, Circuit
Judges.

**The panel is unanimously of the opinion that oral argument is not required in this case. Fed. R. App. P.34(a).*

In this action under 42 U.S.C. §1983, the district court entered judgment in favor of Sato and the Honolulu Building Department after trial on stipulated facts. On appeal, Merena argues that the district court erred by (1) construing his complaint to allege only violations of the fourth and fourteenth amendments, and not the first amendment, and (2) refusing leave to amend the complaint to allege a claim based on the first amendment.

The district court did not err in finding that Merena's complaint, read as a whole and viewed broadly and liberally, *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1381 (9th Cir. 1982), did not state a first amendment claim. Merena argues that alleging the criminal charges stemmed from the placement of a political sign constitutes notice of a first amendment claim. This, however, was not sufficient to notify appellees that Merena intended to seek recovery under a first amendment history.

Refusing to allow Merena to amend his complaint, almost two years after it was filed and after substantial pretrial activity had occurred, was not an abuse of discretion. See *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The judgment is AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of Honolulu;
and **BUILDING DEPARTMENT FOR THE CITY
AND COUNTY OF HONOLULU**,

Defendants.

**CIVIL NO. 78-0299
VERIFIED COMPLAINT;
DEMAND JURY TRIAL;
SUMMONS**

VERIFIED COMPLAINT

Comes now **KENNETH A. MERENA**, Plaintiff
above-named, by and through his attorneys, **JOHN F.
SCHWEIGERT AND PETER KENT**, and for cause of
action against **NORMAN SATO**, and the **BUILDING**

DEPARTMENT FOR THE CITY AND COUNTY OF HONOLULU, Defendants above-named, alleges and avers as follows:

I. PARTIES

1. Plaintiff KENNETH A. MERENA (hereinafter "Merena") is a citizen of the United States of America and a resident of the City and County of Honolulu, State of Hawaii.

2. Defendant NORMAN SATO (hereinafter "Sato") is now, and at all times relevant hereto, has been a citizen of the United States and a resident of the City and County of Honolulu, State of Hawaii. Defendant Sato is also Building Inspector for the City and County of Honolulu, a municipal corporation and governmental subdivision of the State of Hawaii. Defendant Sato is being sued in both his individual and representative capacity as Building Inspector.

3. Defendant Building Department for the City and County of Honolulu (hereinafter "Building Department") is an agency under the Executive branch of government for the City and County of Honolulu, State of Hawaii.

II. JURISDICTION AND VENUE

4. This action involves a deprivation of Plaintiff's rights guaranteed under the Constitution of the United States and 42 U.S.C. §1983.

5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343.

6. Furthermore, all of the acts complained of in this matter occurred within the State of Hawaii making this Court proper for purposes of venue.

III. CAUSE OF ACTION

7. On or about April 11, 1978, Defendant Sato inspected the premises located at 1234 Wilder Avenue for possible violations of the Comprehensive Zoning Code (hereinafter "CZC") for the City and County of Honolulu. More specifically, Defendant Sato was investigating placement of a political sign sponsoring Chuck Norwood

placed in the front yard of the premises located at 1234 Wilder which constituted a violation of §21-223(e), CZC. The sign read as follows:

		C
V		O
O	CHUCK	N
T	NORWOOD	C
E		O
		N

8. At the time of inspection, Defendant Sato was Building Inspector with the Defendant Building Department.

9. At the time of said violation, Plaintiff Merena rented the premises located at 1234 (A) Wilder, this being the property located behind the property on which the sign was placed.

10. Furthermore, Plaintiff Merena never gave permission for Chuck Norwood, the maker of the sign, to so implace it there.

11. Furthermore, in the matter at bar, there was no violation of law for to violate §21-223(e), CZC, a political sign must remain on the premises five (5) days after Notice of Violation has been given. (See, §21-228, CZC). Notwithstanding, the sign was removed from the 1234 Wilder premises within two (2) days after the Notice of Violation was sent by Defendant Sato. the date of such removal is therefore estimated to be April 13, 1978.

12. In spite of this, Defendant Sato swore out a criminal complaint on April 19, 1978, several days after the sign had been removed from the 1234 Wilder premises. This complaint went unopposed by Defendant Building Department.

13. Consequently, the Plaintiff was forced to appear in Criminal Court on July 28, 1978, and answer the charges against him. At the trial that day, all charges for alleged violations of the CZC were dismissed for reasons
enumerated above.

14. It is Plaintiff's position that at the time of filing said Criminal Complaint, probable cause did not exist for the charges brought against him. Furthermore, based upon the oral testimony of Defendant Sato at the trial in this matter, said Defendant was in fact aware that this was so.

15. Because of such knowledge, Defendants' actions were done under color of law and in derogation of Plaintiff's rights guaranteed under the Fourth and Fourteenth Amendments to the United States Constitution, as well as under 42 U.S.C. §1983.

16. By reason of Defendant's actions, the Plaintiff had to employ legal counsel to defend him in this matter and for which he incurred reasonable attorney's fees in the amount of Three Hundred Ninety and no/100ths Dollars (390).

17. By reason of Defendants' action, Plaintiff was unable to attend work as an ironworker and sustained damages for loss of earnings in the amount of Two Hundred Fifty and no/100ths Dollars (\$250).

18. By reason of Defendants' action, Plaintiff has incurred extreme humiliation, embarrassment and emotional trauma entitling him to general damages in the amount of Fifteen Thousand Four Hundred Fifty and no/100ths Dollars (\$15,450).

19. Furthermore, the acts, conduct and behavior of Defendants were done knowingly, intentionally and maliciously by reason of which Plaintiff is entitled to punitive damages in an amount to be proven at trial.

WHEREFORE, Plaintiff prays that the Court enter judgment so as to:

1. Award Plaintiff general damages of \$15,450.00.
2. Award Plaintiff special damages of \$640.00.
3. Award Plaintiff punitive damages in the amount to be shown at trial.

4. Award Plaintiff reasonable costs and expenses of this action and such other and further relief as the Court may deem just.

DATED: Honolulu, Hawaii, August 11, 1978

/s/John F. Schweigert

VERIFICATION

Kenneth A. Merena, Plaintiff in the above-entitled action, hereby certifies that he has read the foregoing Complaint, and believes the allegations contained therein are true to the best of his knowledge and belief.

/s/ Kenneth A. Merena

KENNETH A. MERENA

SUBSCRIBED AND SWORN

to before me this 11th

day of August, 1978.

/s/John F. Schweigert

JOHN F. SCHWEIGERT

Notary Public, First Judicial Circuit, State of Hawaii

My commission expires: March 14, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KENNETH A. MERENA,
Plaintiff,

vs.

NORMAN SATO, et al.,
Defendants.

CIVIL NO. 78-0299
MEMORANDUM OF POINTS AND AUTHORITIES

MEMORANDUM OF POINTS AND
AUTHORITIES

I. INTRODUCTION.

As noted in the Complaint filed in this matter, on or about April 11, 1978, the Defendant Norman Sato, while acting allegedly in the capacity of a building inspector for the City and County of Honolulu, inspected the premises of the Plaintiff's home located at 1234 Wilder Avenue. The purpose of the inspection was that Defendant Sato believed there were in fact possible violations of Section 21-223(e) of the Comprehensive Zoning Code (hereinafter "CZC"). The particular violation was placement of a political sign in a residential neighborhood in the Makiki area.

In fact, the Plaintiff rented the premises located *behind* this particular lot wherein the sign was placed and was in no way, shape or form responsible for its placement. Notwithstanding, on April 19, 1978, the Defendant swore out a criminal complaint so as to initiate process against the Plaintiff. At the time of said swearing, the

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,
vs.

**NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,**
Defendants.

CIVIL NO. 78-0299
**MOTION FOR SUMMARY JUDGMENT; MEMO-
RANDUM OF POINTS AND AUTHORITIES;
EXHIBITS "1", "2", AND "3"; NOTICE OF MOTION.**

MOTION FOR SUMMARY JUDGMENT

COMES NOW KENNETH A. MERENA, by and through his attorney JOHN F. SCHWEIGERT, and moves this Honorable Court for summary judgment as to the issue of liability for on this point there is no factual issue in dispute and the Court can rule as a matter of law based on the record and file already entered in this matter.

This Motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure and is further supported by the Memorandum of Points of Authorities attached hereto and incorporated herein by reference.

DATED: Honolulu, Hawaii, August 7, 1979.

/s/ John F. Schweigert
JOHN F. SCHWEIGERT
Attorney for Plaintiff

APPENDIX E

Defendant was well aware that Plaintiff was not in violation of the law.

As a result of Defendant's efforts, on July 28, 1978, Plaintiff was forced to answer in Criminal District Court for violations of the CZC. For such offense Plaintiff faced a penalty of \$1,000 and/or jail up to 30 days.

II. ARGUMENT.

As noted earlier, there was no violation of law in this case other than that caused by Defendant. Plaintiff noted in the complaint that there was not only a lack of probable cause in the filing of this complaint, but in fact the filing said complaint must infer malice. *See* Restatement (Second) of Torts, §669 (1966). This point was conceded by the Defendant himself who openly admitted in the earlier criminal proceedings:

"Q: Mr. Sato, you state that the sign was taken down. Did you give a number of days after the notice was given?

A: According to the CZC, it was five days.

Q: Do you know in how many days it was taken down?

A: When I passed there [a] couple of days later, it was down.

Q: It was less than five?

A: Yes, less than five.

Q: This was after the notice was given?

A: Yes sir."

(see Exhibit 1)

As to the ownership of the property, it was known that the property in fact was not that of Plaintiff's, i.e.,

"Q: You say it's Mr. Merena's sign, but *not* his property?

A: Yes."

(See Exhibit 2)

In fact, little if any effort was taken to ascertain that the first part of the statement was correct for as noted further on in the proceeding:

"Q: What efforts were taken [to assure] that Ken Merena is the guy that put up the sign?

A: It was told by the owner of the property.

Q: Didn't you want to talk to Chuck Norwood [the name written on the political sign for whom office was being sought]?

A: I tried to get a hold of him, but he didn't even return the call."

(See Exhibit 3)

Based on such paltry evidence and investigation of whether a zoning violation had occurred, a Notice of Violation was issued April 12, 1978. Such terms are apropos for when questioned at trial, the following soliloquy unravelled:

"Q: But did he tell you that it was his sign?

A: Well, he didn't say that.

Q: So he didn't tell you that it was his sign.

A: As I said, I called the owner of the property.

Q: Well, let me correct that. Was there any person besides the owner of the property who said to you that that was Ken Merena's sign?

A: No. I called just the owner."

(See Exhibit 3)

There is no question that the prosecutor, when he filed the complaint acting at the request of Defendant Sato, was bringing criminal charges to bear on an individual for no reason. Furthermore, there is no question that Defendant Sato *knew* at the time he file and signed the complaint that in fact *no punishable violation of law existed*. In fact, it was abundantly clear by the Defendant's own admission that the Plaintiff himself said he would contest the matter in court if the Defendant pursued such a frivolous complaint for the Plaintiff has a long track record of standing up to his rights, i.e.,

"Q: Is the only thing that lead you to believe that the defendant was in violation of the law a statement made by him to you, 'I want to contest this thing in court'? Is that the only factor that lead you to sign that complaint?

A: Yes.

(See Exhibit 3)

As noted in *Monell v. New York City Dept. of Postal Service*, 56 L.Ed.2d 611 (1979), local governments, municipal corporations and school boards are "persons" subject to liability under 42 U.S.C. §1983 for violating another person's Federally protected rights.

In view of the foregoing, which includes the Defendant Sato's own admission, he acted with reckless disregard for the civil liberties of the Plaintiff. Such callous indifference therefore constitutes a classic case of deprivation of rights sought to be protected by 42 U.S.C. §1983, justifying this court's ruling without further evidence as to liability for the record is clear.

III. CONCLUSION.

For such reasons, the Plaintiff prays that his Motion for Summary Judgment as to the issue of liability be granted.

DATED: Honolulu, Hawaii, August 7, 1979.

/s/ John F. Schweigert

JOHN F. SCHWEIGERT

Attorney for Plaintiff

Q Mr. Sato, you state the sign was taken down. Did you give a number of days after the notice was given?

A *According to the CZC it was 5 days.*

Q You know how many days it was taken down?

A *When I passed there couple days later it was*

down.

Q It was less than 5?

A Yes, less than 5.

Q This was after the notice was given?

A Yes, sir.

Q You mention you do not know Ken Merena, but can you state how you know it was his property?

A According to the owner of the property, he said Mr. Merena put it up.

Q Did you rely solely — how did you confirm who owned the property where the sign was put on?

A By the owner of the property.

Q They said that's Ken Merena?

A That sign.

Q I'm talking about the property where the sign was placed, the property on which the sign was placed. I'm not talking about the sign, the property on which the sign was placed, is that property Mr. Merena's?

A No.

Q That property belongs to who then?

A I forgot the name.

Q But it's not Mr. Merena?

A Yes.

Q What efforts were taken to — is it a violation of CZC if you don't own the property and yet there's a violation on that property?

A Yes, any political sign.

A But if it's not the person's property?

A Any person that erects any sign in a prohibited area is in violation.

Q You say it's Mr. Merena's sign, but not his property?

A Yes.

Q What efforts were taken to give Mr. Merena notice of violation?

A There was a complaint.

Q Complaint that was served on him to tell him there was a violation?

A Yes.

Q Did that complaint give him time to make the correction?

Q But you don't know if he received or received it for a fact. How can you assume he received it?

A It says on the notice from the day of the date of the notice they have 5 days to comply.

Q What if he never received it?

A I don't know.

Q The 5 days would start from the day he received official notice of the violation?

A Right.

Q So that if you found out he didn't receive notice — as soon as official notice was given to him that's when the 5 days start to run? *A s soon as you know the guy got an official notice by a paper document so that the guy knows he violated the law?*

A Yes.

Q Did you ever talk to a Chuck Norwood?

A No.

Q *What efforts were taken that Ken Merena is the guy that put the sign?*

Q *What efforts were taken tht Ken Merena is the guy that put the sign?*

A *It was told by the owner of the property.*

Q *Didn't you want to talk to Chuck Norwood?*

A I tried to get hold of him, but he don't even return the call.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and **BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU**,
Defendants.

CIVIL NO. 78-0299
**ORDER DENYING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMARY JUDGMENT**

Plaintiff's Motion for Summary Judgment having
come on for hearing on August 31, 1979 before the
Honorable Samuel P. King, and the Court having heard
the arguments thereon,

**IT IS HEREBY ORDERED, ADJUDGED AND
DECREED** that Plaintiff's Motion for Summary Judg-
ment be and is hereby denied.

DATED: Honolulu, Hawaii, September 10, 1979.

/s/Samuel P. King

SAMUEL P. KING

Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/John F. Schweigert

JOHN F. SCHWEIGERT

Attorney for Plaintiff

250 South Hotel Street

Second Floor, Auditorium

Honolulu, Hawaii 96813

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and **BUILDING DEPARTMENT OF
THE CITY AND COUNTY OF HONOLULU**,
Defendants

CIVIL NO. 78-0299

DEPOSITION OF KENNETH A. MERENA

Taken on behalf of the Defendants, on Friday,
November 9, 1979, commencing at 10:20 a.m., at the
offices of the Corporation Counsel, Honolulu Hale,
Honolulu, Hawaii, pursuant to notice.
APPEARANCES:

For the Plaintiff: **JOHN F. SCHWEIGERT, ESQ.**
250 South Hotel Street, 2nd Floor
Honolulu, Hawaii 96813

For the Defendants: JOHN W.K. CHANG, ESQ.
Deputy Corporation Counsel
Honolulu Hale
Honolulu, Hawaii 96813

REPORTED BY:

Harold E. Cook, Notary Public
First Judicial Circuit, State of Hawaii
POWERS & ASSOCIATES
Registered Professional Reporter
340 Alexander Young Building
Honolulu, Hawaii 96813
(808) 521-7815

MR. CHANG This is a verified complaint, though.

MR. SCHWEIGERT: He signed it saying that the actions, the individual actions that he is saying in the Complaint are true; but as to the cause of action of being a legal question, I object to the question and I will instruct him not to answer that.

THE WITNESS: I will defer to my attorney on that.

MR. SCHWEIGERT: I want you to ask him what he's mad about.

MR. CHANG: I'm asking him. He claims in his Complaint under 1983, the Civil Rights Act, that his civil rights were violated.

Q. Is this correct; is this what you are saying?

MR. SCHWEIGERT: Why don't you say what civil rights you mean, being quiet at home kind of thing?

THE WITNESS: Well, wait, can I intercede in this?

MR. SCHWEIGERT: No.

THE WITNESS: Then I have to defer —

Q. (By Mr. Chang) do you know what civil rights are? Do you have an idea of what we call "civil rights"?

A. Yes, I certainly do.

Q. All right, what is your understanding of what civil rights are?

A. Well, for one thing, I'm a very strong believer in and supporter of the Constitution of the United States and I

think that the most overlooked rights that people have are these fundamental rights contained in the Bill of Rights, the first ten amendments to the Constitution — and to amplify on that it is the clear contention that the CZC is in flagrant violation in this case of the First Amendment, the right to free speech.

Q. Okay. Is this what you are suing for, then; is that one of your grounds?

A. No, that is not — unfortunately, that is the stand that I urged Norwood to take. I couldn't because I had no responsibility for the sign, but if I had I darn well would have stood on that right.

Q. What do you perceive, then, as far as your action?

A. Okay; then under the color of law, this man, Norman Sato, took action against me which sought to deprive me of my rights, which simply were a right to a fair trial and a right to due process — no question in my mind that he violated his own administrative procedure — he says, himself, in his own deposition and his own statements at trial that the sign was taken down after two days after the Notice of Violation was ostensibly served on me, which case it would never have been a violation in the first place because of this it was thrown out of court.

Q. Okay. That is only what he thought what the law was; is that correct?

POWERS & ASSOCIATES
Registered Professional Reporters
340 Alexander Young Building
Honolulu, Hawaii 96813
(808) 521-7815

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A MERENA,
Plaintiff,

vs.

**NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,**
Defendants.

**CIVIL NO. 78-0299
STATEMENT OF READINESS**

STATEMENT OF READINESS

The undersigned attorney hereby certifies as follows:

1. This case was filed on April 11, 1978 and all essential parties have been served with a certified copy thereof.

2. The nature of the claim is an action for declaration of right in violation of 42 U.S.C. §1983 brought on by the illegal issuance of a criminal complaint in the District Court of the State of Hawaii, Honolulu Division, without probable cause to believe a crime had been committed.

3. All required and permitted pleadings were on file and the action was at issue on August 30, 1978.

4. All necessary and proper preliminary proceedings allowed by statute and rule have been completed by all parties. This was completed as of November 6, 1979; there has been reasonable opportunities to complete them.

APPENDIX H

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,

vs.

**NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR**

**Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,**
Defendants.

**CIVIL NO. 78-0299
ORDER SETTING CASE FOR TRIAL**

ORDER SETTING CASE FOR TRIAL

This matter having come on for hearing before the Honorable Magistrate Thomas P. Young on the 30th of January, 1980 and it appearing to the Court based on the documentation supplied it that all necessary and proper preliminary proceedings allowed by statute and rules have been completed by all parties, and the Court having been further appraised that the action is now ready for trial;

**IT IS HEREBY ORDERED, ADJUDGED AND
DECREED** that the trial in this matter commence on June 17, 1980 at 9:30 o'clock a.m.

5. Trial by jury has been demanded.

6. The action is ready for trial.

DATED: Honolulu, Hawaii, December 17, 1979.

/s/Jack F. Schweigert

JACK F. SCHWEIGERT

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KENNETH A. MERENA,
Plaintiff,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,
Defendants.

CIVIL NO. 78-0299
MOTION FOR ORDER SPECIFYING FACTS NOT IN
CONTROVERSY AND DIRECTING FURTHER
PROCEEDINGS; MEMORANDUM OF POINTS AND
AUTHORITIES; EXHIBITS 1-3; NOTICE OF
MOTION

MOTION FOR ORDER SPECIFYING FACTS NOT
IN CONTROVERSY AND DIRECTING FURTHER
PROCEEDINGS

COMES NOW Kenneth A. Merena, Plaintiff above-
named, by and through his attorney Jack F. Schweigert,
and pursuant to Rule 56(d), Federal Rules of Civil Pro-
cedure moves this Court to enter an Order Specifying
Facts Not In Controvesy and Directing Further Pro-
ceedings for the Order Denying Plaintiff's Motion for
Summary Judgment filed September 10, 1979 failed to
incorporate the specificity required by the above
authority. Without a streamlining of issues Plaintiff
is concerned the jury trial now set for June 17, 1980 will

APPENDIX J

IT IS FURTHER ORDERED that pre-trial on this matter be had on June 9, 1980 at 9:00 o'clock a.m. and that any pre-trial statements be filed no later than June 2, 1980.

DATED: Honolulu, Hawaii, _____ .
/s/ Samuel P King

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/John W.K. Chang

JOHN CHANG

Attorney for Defendants

be unnecessarily confusing for there is yet an issue of law left unresolved by this Court's earlier ruling, to wit: whether a criminal prosecution for violation of §21-223, Comprehensive Zoning Code (sign prohibition), can commence if the 5-day grace period afforded to a party is in fact met.

This Motion is supported by the Memorandum of Points and authorities attached hereto, Exhibits incorporated herein, as well as the record and file in this matter.

DATED: Honolulu, Hawaii, April 29, 1980.

Respectfully submitted,

By /s/Jack F. Schweigert

JACK F. SCHWEIGERT

Attorney for Plaintiff

(CERTIFICATE OF SERVICE ATTACHED)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KENNETH A. MERENA,
Plaintiff,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,
Defendants.

CIVIL NO. 78-0299

**ORDER DENYING PLAINTIFF'S MOTION FOR
ORDER SPECIFYING FACTS NOT IN CON-
TROVERSY AND DIRECTING FURTHER
PROCEEDINGS**

Plaintiff's above-styled motion having come on for hearing May 30, 1980, and the parties having been given an opportunity to submit memoranda and present oral arguments, and the Court having carefully considered the matters relating thereto and being otherwise fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that the motion be DENIED as it is meritless for the reasons given by defendants in their opposition memoranda and their oral arguments, which the Court accepts and adopts as the bases of its ruling.

DATED: May 30, 1980, at Honolulu, Hawaii.

/s/Thomas P. Young
THOMAS P. YOUNG
United States Magistrate

APPENDIX K

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,

vs.

**NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,**
Defendants.

CIVIL NO. 78-0299
**MOTION FOR WRITTEN REPORT OF PROPOSED
FINDINGS OF FACT AND RECOMMENDATIONS
AND/OR IN THE ALTERNATIVE TO VOID ORDER;
DECLARATION OF JACK F. SCHWEIGERT; EXHIBIT "A"; NOTICE OF MOTION**

MOTION FOR WRITTEN REPORT OF PROPOSED FINDINGS OF FACT AND RECOMMENDATIONS AND/OR IN THE ALTERNATIVE TO VOID ORDER

COMES NOW KENNETH A. MERENA, Plaintiff above-named, by and through his attorney, Jack F. Schweigert, and, pursuant to Rule 60(b)(4), F.R.C.P., and Rule IV B(2) & IV B(5), Rules of the United States Magistrate, moves this Honorable Court to either "make a report of proposed findings of fact and recommendations in writing" to the Honorable Samuel P. King, as to the Order Denying Plaintiff's Motion For Order Denying Plaintiff's Motion For Order Specifying Facts Not In Controversy And Directing Further Proceedings, and/or

APPENDIX L

in the alternative to rule said order was void *ab initio* since the Court rendered a decision without having *jurisdiction*.

This Motion is supported by the declaration of Jack F. Schweigert attached hereto and the record and file in this matter.

DATED: Honolulu, Hawaii June 6, 1980.

/s/ Jack F. Schweigert

JACK F. SCHWEIGERT

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KENNETH A. MERENA,
Plaintiff,

vs.

NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,
Defendants.

CIVIL NO. 78-0299
DECLARATION OF JACK F. SCHWEIGERT

DECLARATION OF JACK F. SCHWEIGERT

JACK F. SCHWEIGERT hereby declares as follows:

1. I am attorney of record for Plaintiff above-named;
2. In that capacity I prepared for and attended a hearing on Plaintiff's Motion For Order Specifying Facts Not In Controversy and Directing Further Proceedings held on Friday, May 30, 1980, the Honorable Magistrate Thomas P. Young presiding. Said Motion was refused by Court's entering an Order Denying Plaintiff's Motion For Order Specifying Facts Not In Controversy And Directing Further Proceedings (a copy of which is attached hereto as Exhibit "A");
3. That I hoped I made it clear at said hearing that in an effort to streamline issues going before the jury I felt the Court had a duty to eliminate an unresolved issue of law. More specifically, my question was whether §21-228, Comprehensive Zoning Code, City & County of Honolulu (hereinafter CZC), was meant to temper §21-223, CZC by instituting a 5-day grace period so that a criminal *prosecution* could not be brought against someone displaying a

political sign that was subsequently removed within the grace period;

4. That at the May 30, 1980 hearing I hoped I made it clear that I considered the need for a 5-day grace period to be consistent with U.S. Supreme Court decisions addressing regulations tantamount to an absolute prohibition of First Amendment rights, which §21-223, CZC, *obviously* is, e.g., *Vance v. Universal Amusement Co.*, _____ U.S. _____, 48 U.S.L.W. 4273 (Mar. 18, 1980);

5. That I thought I expressed other reasons as well for the 5-day grace period, included of which would be the doctrines of collateral estoppel, *res judicata* and even the doctrine set forth in *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938). This is in view of the fact that a Hawaii State Court had already established §21-223, CZC, did have a 5-day grace period before a criminal *prosecution* could be had;

6. That due to the Court's written order entered on Friday, May 30, 1980, I believe certain consequences stemming from the above facts were ignored. More specifically the Plaintiff's Motion was one of a *dispositive* nature. Accordingly, Rule IV B(2), Rules of the U.S. Magistrate, mandates this Court can only hear the matter by way of special order from District Judge Samuel P. King. I was unaware at the May 30th hearing that such Order existed;

7. Notwithstanding I believe I am entitled to the specificity called for under the Rules of the Magistrate Court which the Order of May 30, 1980 is not.

8. In the alternative, I ask the Order entered May 30, 1980, void.

I DECLARE UNDER PENALTY OF PERJURY
THAT THE FOREGOING IS TRUE TO THE BEST OF
MY INFORMATION AND BELIEF.

DATED: Honolulu, Hawaii, June 6, 1980.

/s/ Jack F Schweigert
JACK F. SCHWEIGERT
Attorney for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,

vs.

**NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,**
Defendants.

CIVIL NO. 78-0299

**ORDER DENYING PLAINTIFF'S MOTION
FOR WRITTEN REPORT OF PROPOSED
FINDINGS OF FACTS AND RECOMMENDA-
TIONS AND/OR IN THE ALTERNATIVE TO
VOID ORDER**

Plaintiff's underlying "Motion for Order Specifying Facts Not in Controversy and Directing Further Proceedings", heard by this Court on May 30, 1980, was not a dispositive motion requiring a report and recommendations. Additionally, no designation by a district judge treating the motion as a dispositive motion was made and referred to this Court.

The said motion for an order specifying facts was grounded under rule 56(d) of the Federal Rules of Civil Procedure.

Rule 52(a) of the Federal Rules of Civil Procedure specifically states in pertinent part that:

"Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or any other motion except as provided in Rule 41(b)."

Thus, plaintiff is wrong in his argument that this Court is required to submit a written report and recommendations to a district judge. The Court stated in its written Order of May 30, 1980 that the bases of its ruling are the reasons given by defendants in their opposition memoranda and oral arguments which the Court accepts and adopts. This is sufficient.

Accordingly, the Court finds that the present motion lacks merit and it is hereby DENIED.

IT IS SO ORDERED.

DATED: June 11, 1980, at Honolulu, Hawaii.

/s/ Thomas P. Young
THOMAS P. YOUNG
United States Magistrate

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

KENNETH A. MERENA,
Plaintiff,

vs.

**NORMAN SATO, individually and in his capacity as
Building Inspector for the City and County of
Honolulu; and BUILDING DEPARTMENT FOR
THE CITY AND COUNTY OF HONOLULU,**
Defendants.

CIVIL NO. 78-0299
**MOTION TO AMEND COMPLAINT BY LEAVE OF
COURT; DECLARATION OF JACK F. SCHWEIGERT;
MEMORANDUM IN SUPPORT OF MOTION TO
AMEND COMPLAINT; NOTICE OF MOTION;
AMENDED VERIFIED COMPLAINT**

**MOTION TO AMEND COMPLAINT BY LEAVE
OF COURT**

Comes now Plaintiff above-named by and through his counsel, JACK F. SCHWEIGERT, and respectfully moves this court for the entry of an order permitting Plaintiff to amend his complaint in the above-entitled action. Said amendment would include a claim for declaratory and injunctive relief on the grounds that §21-223(e) of the Comprehensive Zoning Code is violative of the First Amendment as discriminating against political speech.

APPENDIX M

This motion is made pursuant to Rule 15, Federal Rules of Civil Procedure, and is supported by the record and hearings in this action, the declaration of counsel, memorandum of point and authorities attached hereto, and the record and file in this case.

DATED: Honolulu, Hawaii, June 23, 1980.

/s/ Jack F. Schweigert

JACK F. SCHWEIGERT

(CERTIFICATE OF SERVICE ATTACHED)